Genstar Stone Products Company *and* United Steelworkers of America, AFL–CIO, CLC. Cases 5–CA–23460, 5–CA–23801, 5–CA–24383, and 5–CA–24403

July 27, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On December 28, 1994, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent filed exceptions, a brief in support of exceptions, and a brief in response to the General Counsel's and Charging Party's cross-exceptions. The General Counsel and the Charging Party each filed limited cross-exceptions, a supporting brief, and a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified below, and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(5) of the Act by presenting regressive proposals in order to frustrate the progress of negotiations. In finding that the Respondent bargained with an intent to avoid reaching agreement, the judge relied exclusively on proposals made at the parties' February 9, 1993 bargaining session.

The Respondent's economic proposal that was on the table prior to the February 9, 1993 bargaining session included the following terms: *wages*—no increase in the first year of the contract, 25-cent increases in September 1993 and September 1994; *health care*—a plan administered by Blue Cross/Blue Shield with employee contributions of $5 per individual and $10 per family, cost sharing for claims from $1000–$10,000 with the Respondent paying 80 percent and the employee paying 20 percent (80/20), full coverage for claims below $1000 and claims over $10,000, and a yearly $650 payment to each employee to offset out-of-pocket health care costs; *ready-mix driver guarantee*—a ''show up'' guarantee of 6 hours' pay for ready-mix drivers if they haul at least one load in the day; and *overtime*—after 40 hours a week.

At the parties' January 15, 1993 negotiating session the Union rejected the aforementioned proposal and presented a counterproposal calling for a 90/10 health care copayment; an 8-hour ''show up'' guarantee for ready-mix drivers; and a commission for bringing in new business.

On February 9, 1993, the Respondent rejected the Union's proposal and modified its own in the following manner: it changed the proposed starting and ending dates of the contract from September 25, 1992–September 24, 1995, to January 1, 1993–December 31, 1995; it postponed the first wage increase from September 26 to December 31, 1993; and it offered a 1-year agreement on health care with a reopener in the second and third year. The Respondent's first year health care proposal included a change of plan administrators from Blue Cross/Blue Shield to Travelers with the same employee contributions and copayment as in its earlier proposal, and a single $650 cost offset. The Respondent also proposed a ready-mix driver ''show up'' guarantee of 4 hours and retained overtime after 8 hours.

Over the course of the next six bargaining sessions, the Respondent substantially abandoned its February 9 proposal. At the sixth session, held April 7, 1994, the Respondent offered to return to the September beginning and ending dates for the contract, to grant the first wage increase of 30 cents on September 26, 1993, with increases of 25 cents in years 3 and 4; an 18-month reopener on health care with the same employee contributions, copayment, and cost offset as proposed on February 9; and a 6-hour ready-mix driver guarantee.

Contrary to the judge, we find that, considering the totality of circumstances here, the record is insufficient to establish that the February 9 proposals were made unlawfully to frustrate the bargaining process. In this regard, we note that the Respondent did not renege on prior agreements, but instead altered proposals which the Union had consistently rejected. Although the judge apparently viewed the Respondent's reasons for changing its proposals as insufficient, we find that the proposals were not so harsh, vindictive, or otherwise unreasonable as to warrant a conclusion they were proffered in bad faith. Under these circumstances, ''it is immaterial whether the Union, the General Counsel or [the judge] find these reasons totally persuasive.'' *Eltec Corp.*, 286 NLRB 890, 896 (1987), quoting *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102–103 (1981). Moreover, we note that in more than 31 bargaining sessions before and after February 9, the Respondent met with the Union at reasonable times and places, reached agreement on noneconomic proposals, abandoned certain economic proposals which the Union objected to, and made concessions in key areas in apparent attempt to reach agreement. Further, there

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

is no evidence of animus or conduct away from the bargaining table establishing an intent by the Respondent to frustrate agreement. Thus, when the record is considered as a whole, the evidence falls short of establishing that the February 9 proposals constituted bad-faith bargaining.

The judge also found that the April 26, 1994 strike was an unfair labor practice strike. We agree. In doing so, we rely in particular on the Respondent's unlawful refusal to provide information pertaining to its health care proposal. The Respondent was seeking substantial concessions from the Union in the area of health care. It became a major dividing point in negotiations. Further, union officials informed the membership immediately prior to the April 13, 1994 strike vote that the Respondent was bargaining in bad faith by failing to provide the requested information. In these circumstances, we find that there was a causal relationship between the Respondent's unfair labor practices and the strike.

We further find that the Respondent's unlawful refusal to provide information precluded a lawful impasse. Therefore, we agree with the judge that the Respondent was not privileged to unilaterally implement its final offer, and when it did so, any changes were made in violation of Section 8(a)(5).[2]

AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 9 and renumber Conclusions of Law 10, 11, 12, and 14 as 9, 10, 11, and 12, respectively.

ORDER[3]

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Genstar Stone Products Company, Hunt Valley, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Reletter paragraphs 1(e) and (f) as paragraphs 1(d) and (e), respectively.

2. Insert the following as paragraph 1(f).

''(f) Refusing to grant accrued vacation pay to striking employees because of their union activities.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain, on request, with United Steelworkers of America, AFL–CIO, CLC concerning sickness and accident benefits.

WE WILL NOT refuse to provide information requested by the Union which is relevant to its bargaining obligation.

WE WILL NOT refuse to process grievances under the grievance procedures of the expired 1992 contract.

WE WILL NOT unilaterally implement the terms and conditions of employment set out in our letter to employees dated May 5, 1994, without valid impasse having been reached.

WE WILL NOT threaten to permanently replace unfair labor practice strikers.

WE WILL NOT refuse to grant accrued vacation pay to striking employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the collective-bargaining representative of our employees.

WE WILL supply the information requested by the Union which is relevant to its bargaining obligation.

WE WILL process grievances under the grievance procedures of the expired 1992 contract.

WE WILL restore and place in effect all terms and conditions of employment provided by the contract that expired on September 25, 1992, which were unilaterally changed, except in such cases where the Union may request that a particular change not be revoked and WE WILL make whole the unit employees for any loss of wages or other benefits they may have suffered by reason of the unilateral implementation of terms and conditions of employment set out in our letter to employees dated May 5, 1994.

WE WILL make whole employees Robert Seymour, Patrick Waldron, Joseph Hewitt, Carmen Lincks, Charles Pennington, Phil Printz, Harry Walker, Paul

[2] Having found that the Respondent's unlawful refusal to provide information contributed to both the strike and the impasse, we find it unnecessary to determine whether the judge correctly found that the Respondent's unlawful refusal to process grievances under the expired contract and its unlawful refusal to discuss a mandatory subject of bargaining on December 15, 1992, were also contributing factors.

[3] The judge apparently inadvertently failed to include a remedy for the Respondent's alleged unlawfully regressive bargaining proposals in the Order section of his decision. The judge also omitted par. 1(d) of the Order. Accordingly, there is no need to delete anything from the judge's Order and we shall modify the judge's Order to reletter pars. 1(e) and (f) as pars. 1(d) and (e). We have amended the Order to conform to the judge's findings with respect to the Respondent's failure to pay unit employees accrued vacation pay. The judge did include provisions in the notice pertaining to his regressive bargaining finding. We have made the appropriate changes to delete these provisions.

Giesbert, Joseph Stang, Robert Appel, Luther Burrick, Chester Stockman, Dale Jones, Stanley Biggus, Clark Kline, Melvin Pirkle, Robert Jackson, Sirrell Weant, Richard Mann, and Clifton Payne, to the extent that this has not been accomplished, for any loss of vacation pay they may have suffered by reasons of the discrimination against them.

GENSTAR STONE PRODUCTS COMPANY

Ronald Broun, Esq., for the General Counsel.
Lacy I. Rice Jr. and *Joan Casale, Esqs*., of Martinsburg, West Virginia, for the Respondent.
Joel A. Smith, Esq., of Baltimore, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charges herein alleging various unfair labor practice violations were filed by the United Steelworkers of America (the Union or Charging Party) against Genstar Stone Products Company (the Employer or Respondent). On June 12, 1994, an order consolidating cases, amended consolidated complaint and notice of hearing issued alleging that Respondent had violated Section 8(a)(1) of the Act by threatening to permanently replace striking employees and that Respondent violated Section 8(a)(3) of the Act by refusing to pay vacation pay to various striking employees. Also, that during the course of contract negotiations preceding the strike, Respondent violated Section 8(a)(5) of the Act by: refusing to process grievances, refusing to bargain over certain mandatory bargaining subjects, refusing to provide relevant and necessary information to the Union, repudiating the grievance procedure of the existing contract, making regressive bargaining proposals, and wrongfully denying the existence of a 401(k) plan for nonunit employees. The consolidated complaint also alleges that a strike undertaken by the Union and lasting from April 26 until June 10, 1994, was an unfair labor practice strike and that Respondent violated Section 8(a)(5) of the Act by implementing on May 10, 1994, various changes in the wages, hours, and terms and conditions of employment of bargaining unit employees without first having reached an impasse in the contract negotiations.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is a Delaware corporation with facilities in Frederick, Boyds, and Rockville, Maryland, where it is engaged in the production of stone and gravel and supplies concrete to various locations in the Washington, D.C. metropolitan area. During the past 12 months, the Employer sold and shipped from its facilities goods and services in excess of $50,000 directly to points outside the State of Maryland. The complaint alleges, the answer admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. The negotiations

Respondent employs a total of about 1100 employees at some 18 locations in Maryland and Virginia. About 800 of these employees are nonunion. The remaining approximately 300 employees are represented in four separate units by two Teamsters local unions, one local union of the International Brotherhood of Machinists, and the unit in issue in the instant case, by Local 81-A of the United Steelworkers of America. The unit consists of about 100 equipment operators, laborers, and truckdrivers at its crushed stone and ready-mix concrete plants in Frederick and concrete plants in Boyds, and Rockville, Maryland.

The most recent collective-bargaining agreement between the parties has expired. The duration of that contract was from September 26, 1989, through September 25, 1992.

On August 17, 1992, the parties' initial bargaining session for a new contract took place.[1] Both parties were represented by a negotiating committee. Luther C. Guise Jr., human resources manager, was Respondent's chief spokesman. Bernard Parrish, International representative of the Union, was the chief spokesman for the Union. At this first session, the parties exchanged proposals, however no complete economic package was proposed until the bargaining session of September 10 and 15, 1992. The Respondent outlined the several economic concessions that it was seeking, representing reductions in the total compensation provided in the existing contract. Respondent proposed: no wage increase for the first year of the contract but might be willing to look at minimal increases in the second and third years of the contract; elimination of daily overtime after 8 hours to substitute therefor overtime after 40 hours per week; elimination of the fifth week of vacation; a 4-hour guarantee after hauling one load of cement to replace the present guarantee of 8 hours; employee health care insurance contributions of $7.50 per week for single employees and $15 per week for family coverage;[2] moving the starting time from 8 to 11 a.m.; individual plant seniority to replace existing plantwide seniority encompassing all three locations; reductions in the guaranteed reporting or ''show up'' pay from 4 hours to 2 hours.

Over the last few days that preceded the expiration of the contract on September 26, 1992, negotiating sessions were held wherein Respondent revised and defined some of its proposals. With respect to the health care coverage, Respondent proposed that with respect to health care costs from

[1] It is undisputed that approximately 31 bargaining sessions were held between August 17, 1992, and the time that the strike began on April 26, 1994.

[2] At this time, the Respondent was self-insured for its health insurance coverage under a health care program administered by Blue Cross/Blue Shield. Since 1977, unit employees had not been making any contribution for their health care and enjoyed first dollar coverage with no deductibles or copayments. In other words, the health insurance was totally without cost to the employee.

zero dollars to $1000, Respondent would pay the usual and customary charges in full after a deductible ($200 single and $400 family) had been met. Health care costs between $1001 and $10,000 would be shared, 20 percent paid by the employee and 80 percent by the Employer. All costs in excess of $10,000 would be paid 100 percent by the Employer. Employee contributions for coverage would be $7.50 per individual and $15 per family on a weekly basis. Respondent also proposed paying unit employees $650 per year for each year of the contract to offset health care contributions. Respondent also reduced its starting time demand to a 9 a.m. starting time and offered to reduce the 8-hour guarantee to 6 hours, up from 4 hours. As to wages, Respondent was now offering nothing for the first year, 15 cents for the second year, and 15 cents for the third year.

With the contract expiring on September 26, 1992, a union meeting was held at 6 p.m. on September 25, 1992, to explain the Respondent's proposal and either to accept or reject it. At this meeting, the Respondent's proposals were reviewed and rejected as unacceptable, but no strike vote was taken and it was agreed that the employees would continue to work while a new contract was being negotiated.

After the contract expired, a series of negotiating sessions were held. At the December 15 negotiating session, Respondent modified certain of its proposals. As to wages, Respondent retained its zero increase in the first year but raised its offer to 25 cents for the second and third years. It also proposed a reduction in health care contributions to $5 per single and $10 per family per week. Respondent represented to the Union that this was the Respondent's final offer and that these proposals would be implemented on January 1, 1993.[3] However, Parrish objected that the next union meeting was scheduled for January 5 and the January 1 date would not give him enough time to discuss the proposal with the membership. Accordingly, Guise revised the date of implementation to January 15.

On January 5, a meeting of the membership was held and the Company's proposal was discussed. At this meeting, several questions were raised by the membership about the proposal, notably the health insurance proposals. Since the membership wanted answers to these questions before considering the proposal, Parrish took note of the questions that had been raised in order to present them to the Respondent at the next negotiating session on January 15.

On January 15, the parties met with the Respondent. Parrish explained that certain questions had been raised at the union membership meeting that he had been unable to answer and he posed them to Guise. The information sought by Parrish included company data to show that its proposal of $5/$10 employee contributions was arrived at; data showing how Respondent arrived at its 80/20 copay formula and what cost savings the Employer could expect by implementing its health care proposals. Parrish also asked for Respondent's quarterly or monthly health care cost reports dated after August 31, 1992, and requested information to show the Employer's financial records including retained earning statements, balance sheets, and profit-and-loss figures. Parrish stated that the information was needed in order for the Union to evaluate the Employer's proposal. Guise conceded that some of the information sought by the Union at the January 15 session was not provided to him by the management committee.[4] Guise did not provide the information, often on the grounds that it was not ''available,'' although some information on health care costs was provided in later negotiating sessions.

The Union also made a proposal at the January 15 session that it hoped it would resolve the differences. It suggested a 90/10 copayment provision, retain overtime after 8 hours, as well as the 8-hour guarantee for ready-mix drivers, with the addition of a ''sweetener'' up front as a payoff for new business. Guise said that it was a reasonable proposal and that he would take it to the Company. Thus it appears that on January 15, the Union appeared to be willing to give serious consideration to some employee contribution to health care coverage.

At the next negotiating session on February 9, Guise told the Union that he had taken its proposal to the management committee and that he was now prepared to make a counterproposal. Respondent proposed a health care package for 1 year rather than the length of the contract, to run from April 1, 1993, through March 31, 1994, with the same $5/$10 employee contribution. Maximum out-of-pocket expenses would be limited to $1800 single and $3600 family and a single $650 health care cost offset payable to employees on April 1, 1993. In addition, the administrator of the program would be changed from Blue Cross/Blue Shield to Travelers. The Company's proposal also included a change in the expiration date from the dates previously proposed, i.e., September 25, 1993, through September 24, 1995, and proposed contract dates from January 1, 1993, through December 31, 1995, with the first wage increase to be effective December 31, 1993, rather than September 26, 1993.

Respondent also reduced its daily guarantee proposal for ready-mix drivers from 6 hours to 4 hours. Respondent did, however, agree to drop its proposal to pay overtime only after 40 hours per week rather than 8 hours per day.

At the negotiating session of April 14, the Union made additional requests for information similar to the information previously sought on January 15, including quarterly or monthly health care cost financial records, retained earning statements, balance sheets, and profit-and-loss figures, and, on April 14, asked for financial data to corroborate Respondent's position that retaining Blue Cross/Blue Shield as administrator of the health plan would be more expensive than shifting to Travelers Insurance Company as administrator of the plan. Although Guise testified that he does not recall requests for information being made at this meeting, nor do the Respondent's notes of these meetings reflect such requests, having reviewed the entire record, I am satisfied that Parrish's testimony in this respect is more reliable and that

[3] All dates refer to 1993, unless otherwise indicated.

[4] It appears that in addition to the negotiating committee Respondent had a management committee consisting of Bernard L. Grove, president of Respondent; K. W. Snyder, vice president of aggregates; Edward J. Szympruch, vice president of concrete and paving; Donald E. Bowman, chief financial officer; and James Underwood, director of human resources. It was to this group that Guise reported after the negotiating sessions, and it was this group that defined in the parameters of Guise's authority. The management committee also instructed Guise with respect to the proposals and counterproposals to be made by the negotiating committee. No one from the management committee testified at the hearing.

none of the information requested was provided to the Respondent.

On April 23, 1993, Respondent proposed what it described as final offer options A and B. These offers were as follows:

Option A —

Health care—Provider would be Blue Cross/Blue Shield with starting date of June 1, 1993, if agreement reached today, to be renegotiated in one year, Article 13 not prevailing. The $650.00 offset to be paid on or about June 1, 1993. Contributions would be $5 for single coverage and $10.00 for family coverage, which can be made pre or post tax. The first dollar to $1,000.00 incurred medical expenses covered in full; $1,001.00 to 10,000.00 would be covered 80/20; 10,001.00 up would return to full coverage.

Contract dates—December 23, 1992 to December 22, 1995.

Wages—Zero the first year; $ .25 December 23, 1993; $ .25 December 23, 1994.

Guarantee for hauling single load of concrete—4 hours

All items already agreed upon and grievances settled as agreed upon.

All language changes as previously agreed upon.

Printing of contract split 50/50 with Union.

Option B —

Health Care—The same as Option A

Contract dates—January 1, 1993 to December 31, 1995

Wages—Zero the first year; $ .35 January 1, 1994; $ .25 January 1, 1995.

Guarantee for hauling single load of concrete—6 hours

All items already agreed upon and grievances settled as agreed upon.

All language changes as previously agreed upon.

Printing of contract split 50/50 with Union.

Unfair Labor Practice charge withdrawn.

Pending grievances withdrawn.

The Union responded that both options were unacceptable and told Guise that they would not recommend the package to the membership. Guise responded that this was the best that the Respondent could do and concedes that he may have said that ''the well is dry,'' but testified that it was meant in the sense that he had no authority to offer any more than he had proposed.

After several months of inactivity, another negotiating session was held on August 3 wherein Guise proposed a return to the contract date of September 26, 1992, to September 25, 1995, with wage increases of 35 cents January 1, 1994, 25 cents on September 26, 1994. Also, a 1-year agreement on health insurance to include a change of administrators from Blue Cross/Blue Shield to Travelers and a first year $650 health insurance cost offset when the plan was implemented. Further, employee contributions to be $5 per individual, $10 per family, a 6-hour guarantee for ready-mix drivers, and a sign-off on the other items agreed to, together with a 9 a.m. starting time. The Union expressed disagreement with this proposal and also expressed the Union's desire for consideration of a 401(k) plan.

At a negotiating session on September 26, the Union again raised for consideration the establishment of a 401(k) plan for unit employees. According to the testimony of Parrish, the Union was told by Guise that none of the Respondent's employees were receiving a 401(k) plan because the Company was not set up for it when, in fact, some of the nonunion employees did have such plan. Later, according to Parrish, the Union learned about the existence of the 401(k) plan available to nonunion employees of the Respondent. Respondent's notes of this meeting suggest that the Union was aware that others in the Company belonged to the 401(k) plan since the Union asked for a 401(k) plan ''as now enjoyed by others within the Company.'' Guise denied ever stating that no other employees in the Company enjoyed a 401(k) plan, saying only that the Company was not set up for union employees to get it. Guise's testimony is generally supported by other company negotiators, David Whitehurst, production manager; John Ketterman, superintendent of the Frederick quarry; and David Stenson, expediter.

It seems unlikely to me that Guise would lie about the existence of such an obvious matter as a 401(k) plan already available to other employees within the Company and a little improbable that none of the union employees on the union negotiating committee would be aware of the existence of such a plan. Be that as it may, the probative evidence, including Guise's testimony and the notes of that meeting persuade me that Guise did not lie about the existence of a 401(k) plan for nonunion employees on September 16.

After the September 16 meeting, there was another hiatus in contract negotiations until March 9, 1994,[5] when the Respondent once again presented a revised proposal, much the same as its previous offering, but adding a fourth year to its proposal. Once again, the proposal was viewed by the Union as unacceptable and the Union offered written counterproposals setting out proposals on the outstanding contract issues. Guise agreed to take the written proposals back to the management committee for consideration.

On April 7, 1994, Guise responded to the Union's proposals of March 9, advising the Union that they were not acceptable and setting out the terms of its own proposal, basically the March 9 proposal, which was presented to the Union as final. The contract term was to be September 26, 1992, to September 25, 1996. With respect to health care, Respondent insisted on a change to Travelers as the administrator with employee contributions at $5 individual and $10 family. The health plan was to be for an 18-month duration with a reopener at that time. The plan would pay 100 percent of the coverage to $1000 and over $1000, it would pay 80 percent after a deductible of $100 per individual and $200 per family. Over $10,000, the plan would pay charges in full up to a lifetime limit of $1 million. Maximum amounts of out-of-pocket expenses were set at $1800 per individual and $3600 per family. The plan also provided a one-time $650 individual payment to offset the cost of health care contributions. Other economic items included a daily guarantee of 6 hours; a starting time at 9 a.m.; wage increases zero in the first year, 30 cents in the second, 30 cents in the third, and

[5] A meeting was held on December 14, but outstanding grievances were discussed rather than contract discussions.

25 cents in the fourth, as well as increases in retirement benefits and sickness and accident benefits for the 4 years of the contract.

A meeting of the union membership was held on April 13, 1994, to consider the Respondent's proposal and to take a strike vote. Parrish went through the bargaining process with those in attendance. Among the subjects raised for discussion were the changes in position taken by Respondent during the bargaining process, notably in its health care proposals, and Parrish offered the opinion that Guise had lied to the negotiating committee by telling them that the Company had no 401(k) plan. Respondent's failure to provide financial and health care information was reviewed. Parrish told the membership that Respondent was not bargaining in good faith and was committing unfair labor practices by its conduct at the bargaining table.

A strike vote was taken and passed, but no date was set for the strike. It was agreed that the negotiating committee could decide the date and a strike was called to begin April 26 at 6 a.m. at all three locations where union members were employed. The picket signs bore such legends as ''Unfair Labor Practice Strike,'' ''Genstar Unfair,'' and ''This Plant on Strike—USA.''

At a meeting held after the strike began on April 27, Guise advised the Union that the Company was making its final proposal and that the Union's last proposal was unacceptable to the Company. Guise also told the Union that the employees were free to return to work and would not be locked out.

By a letter dated May 5, 1994, from Bernard Grove, president of Respondent, to Parrish, Respondent reiterated the provisions of its final proposal, concluded that an impasse had been reached, and announced the implementation of its proposal on May 10 at 6 a.m. The letter also announced that work would be available to striking employees under the terms of the implemented proposal providing, however, that any returning employee must notify the Respondent by May 9 of his desire to return to work. Further, that employees could return to work after May 9 as openings were available. The letter concluded with the statement, ''After May 9, 1994, Genstar intends to hire permanent replacement workers to perform the duties and take the place of the strikers.''

Substantially the same letter was sent by Grove to bargaining unit employees with a concluding paragraph reciting in relevant part that if they did not respond to the Company's offer to return to work by May 9, 1994, they would be replaced. In that regard, the letter states:

> After that date, Genstar intends to hire permanent replacement workers who will perform the duties and take the place of the striking bargaining unit employees. Your legal right to reinstatement to your former position will be changed as of the above date if you choose not to accept this offer. Please consider this offer carefully and contact Genstar if you wish to return to work.

By letter dated May 7, 1994, Parrish wrote to Grove disagreeing with the conclusion that impasse had been reached because the Employer's unfair labor practices had precluded any valid impasse, and that the unilateral implementation of its final offer was ''still another unfair labor practice.''

Poststrike negotiating sessions were held on May 10 and 13, as well as June 9. Parrish testified that on June 9 a meeting with the membership was held and a decision was made to end the strike in order to prepare for the upcoming National Labor Relations Board hearing. Additional meetings were held after the strike ended on June 15 and 27, focusing primarily on discussions of the implementation, including the health care proposal and other problems dealing with various aspects of the implemented proposals as well as various contract items not included in the implemented proposals, but no agreement has been reached on a contract.

2. Pleas of inability to pay

It became apparent early on in the negotiating sessions that Respondent was seeking major concessions. The Union expressed the view that if this were the case, it was entitled to see the books to see if the concessions were warranted. At various times during negotiations, Guise described 1992 as a poor year that the Company had suffered as a result of the economic turndown in the area. Guise also advised the Union of competition moving into the area and stated that the concessionary proposals being made were necessary in order to remain or even improve the Company's competitive position in the face of growing competition from other companies. Guise also advised the Union that layoffs were taking place at other company locations among nonunion personnel. He told the Union that the Company was downsizing to create a lower base and improve profits.

On February 9, when the Company made a reduced proposal, it did not claim that its poor economic condition was the reason, it simply took the position that it was a better economic decision for the Company. Guise also stated other companies had lower costs, particularly with regard to health care that made reductions in health care costs desirable for the Respondent.

At the time the Company made final offers on April 23, 1993, Guise explained that the ''well was dry.'' But he made it clear that he was not pleading poverty, only that this was all he had the authority to offer.

When Parrish requested information about health care and corporate financial costs, he explained that these were necessary for him to review to see whether the Company had the ability to meet union demands and also to see if the concessions sought by the Company were warranted. Parrish was also aware, from sources within the Union, that the Company appeared to be in sound financial condition. For the most part, Guise told the Union that the Company's bargaining position was dictated by a desire to remain competitive, not poverty, and that there was money available for a new contract. Guise told the Union that the Company was being invaded by competitors who were selling at lower prices, making it important for the Company to reduce costs to remain competitive and to improve their share of the market. Guise denied ever saying that the Company was pleading poverty or was financially unable to meet the Union's demands or that the Company's financial condition was the reason for seeking concessions.

The testimony of Whitehurst, Ketterman, and Stenson all support the testimony of Guise that when the question arose about seeking concessions or meeting the Union's demands Guise never took the position that the Company was financially unable to meet these demands or that it was seeking

concessions due to financial considerations, but simply that his negotiating positions were based on the Company's desire to be competitive and to improve its competitive position.

3. Sickness and accident benefits

With respect to the topic of sickness and accident (S & A) benefits, it appears that the matter was first raised by the Union after the contract expired at a negotiating session held on December 15, 1992. The Union proposed an increase from $210 per week to $360 per week over the term of the contract.[6] At that session, Guise took the position that he was not going to discuss S & A benefits since they were not a part of the content of the Company's written proposal, but later, in August, the subject was raised again in a negotiating session and Guise asked the Union what it was proposing. After some discussion, Respondent proposed to raise the S & A benefits $5 per year for each year of the contract, which proposal was implemented unilaterally on May 10, 1994.

4. Grievances

After the expiration of the contract and prior to the implementation of company proposals on May 10, 1994, various grievances were filed by the Union alleging violations of the expired contract based on events which occurred after the contract had expired. Respondent did not reply to the grievances, and on about July 1, Charles Diggs, then president of the Union and a negotiating team member, approached Ketterman on the matter. Ketterman referred him to Guise who responded that since the contract had expired, he was under no legal obligation to process those grievances. Guise concedes that he did not honor the arbitration provisions of this expired contract. Later in July, after unfair labor practice charges had been filed, Respondent began to respond to the grievances. Respondent's answer to the grievances, submitted by Ketterman and appearing on each of the grievances, states:

> 1. As the alleged events or conduct relating to this grievance occurred after the expiration of the collective bargaining agreement, and there has been no extension, the Company has no contractual obligation to participate in arbitration of these grievances should the union attempt to appeal them to that step.
>
> 2. Without waiving the Company's position as stated in No. 1 above, the Company denies the grievance on the grounds that the Company has acted within its inherent and contractual rights with respect to all alleged conduct. Grievance denied.

At various times during the negotiations, it appears that there was some limited informal discussion of grievances and some were resolved in this manner, although none were processed under the grievance procedures of the expired contract.

5. Vacation pay

The parties stipulated at the time that the strike began on April 26 that several of the striking employees had accrued vacation time scheduled to be taken during the strike and that they were not paid their vacation time. Normally, vacation pay was paid the week prior to the vacation.[7] It is undisputed that this was a corporate decision made by the management committee. Guise testified that Respondent was awaiting advice on the matter from counsel. It appears that when the strike ended, those employed from whom vacation pay had been withheld were allowed to reschedule vacations and were paid or have been allowed to work through their vacations and been paid their vacation time.

B. *Analysis and Conclusions*

1. Negotiations

From the time the negotiations began on August 17, 1992, Respondent made it clear that it was seeking substantial give-backs from the Union in the economic provisions of the existing contract. In the area of health care, the unit employees enjoyed health care coverage without any employee contribution and received first dollar coverage under a self-insured plan for unit employees administered by Blue Cross/Blue Shield. As noted above, in greater detail, Respondent was demanding that unit employees make a weekly contribution to the cost, pay an annual deductible and a percentage of coinsurance, none of which had been required since the existing health care plan was established in 1977. Employee remuneration would also have been reduced by not having any wage increase in the first year of the contract; elimination of daily overtime; and elimination of a fifth week of vacation; reducing the ready-mix truckdriver guarantee from 8 to 4 hours; establishing a later starting time, and reducing showup pay from 4 to 2 hours. Obviously, these proposals would mean substantially reduced income for unit employees and would be difficult for the membership to accept.

After some negotiation, Respondent, on December 15, 1992, made a final proposal to the Union, as set out above, and told the Union that this proposal would be implemented on January 1, later changed to January 15, to allow the Union an opportunity to present the proposal to its membership on January 5. Questions about the proposal were raised by the membership at the meeting and the questions were presented to Guise at the January 15 negotiating session regarding health care coverage and the Respondent's financial condition. For the most part, Guise failed to respond in any meaningful way to the inquiries. Similar information was requested at a negotiating session on April 14. The Union was not provided with the information that it sought.

[6] Respondent's relevant notes for that session read:

> The Union also stated that since the Company had proposed for the first time throughout that the Sunday and holiday hours worked be reduced to time and one-half that they would now ask that the Accident and Sickness benefit be increased and that the hearing test be covered in the health care package. Mr. Parrish stated that the Union had no set amount of increase in the accident and sickness benefit and would consider what ever the Company offered.

[7] The parties stipulated that those scheduled to take accrued vacation pay during the strike were Robert Seymour, Patrick Waldron, Joseph Hewitt, Carmen Lincks, Charles Pennington, Phil Printz, Harry Walker, Paul Giesbert, Joseph Stang, Robert Appel, Luther Burrick, Chester Stockman, Dale Jones, Stanley Biggus, Clark Kline, Melvin Pirkle, Robert Jackson, Sirrell Weant, Richard Mann, and Clifton Payne.

Respondent contends that it provided the health care information requested. Respondent argues that its negotiating committee provided all the information available to it at the negotiating sessions, apparently drawing a distinction between information made available to Guise by the management committee and the totality of the information available to the Company. This is an artificial distinction. Clearly, the information sought must have been available to Respondent's management committee, and the explanation that the management committee failed to provide Guise with that information in order to respond to the Union's inquiry is no defense.

It is clear as a matter of Board and court law that a union is entitled to that information necessary to perform its duties as collective-bargaining representative of unit employees. Certainly, information concerning an employer's proposed reduction in a contractually negotiated item is germane to the bargaining process and therefore necessary and relevant to the Union in discharging its responsibility to negotiate a contract on behalf of its members. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *Teamsters Local 921 (San Francisco Newspaper)*, 309 NLRB 901, 904 (1992). Accordingly, I conclude that by refusing to honor the Union's request for information concerning health care benefits, Respondent was refusing to bargain within the meaning of Section 8(a)(5) of the Act.

It is also clear, based on this record, that Respondent refused to provide the Union with certain corporate financial records. Respondent takes the position that it was not obliged to provide this information since it was not pleading poverty. Under existing case precedent, in circumstances where an employee is claiming an inability to pay, it is obliged to provide the Union, on request, with the financial data to support that claim. *Nielson Lithographing Co*., 279 NLRB 877 (1986), remanded 854 F.2d 1063 (7th Cir. 1988). In the instant case, while it is clear that Respondent had been affected by a recession in 1992, I cannot conclude that this record, viewed in its totality, supports the conclusion that Respondent was pleading poverty. At various times during the negotiations, Respondent did make statements such as ''the well is dry'' or, in response to union economic proposals, that they were ''too rich'' for Respondent or ''too steep.'' However, the record also discloses that Guise consistently and throughout the negotiation advised that it was not pleading poverty and their objective in making these drastic reductions in its economic proposals was in order to ''remain competitive'' with competitors that did not provide such generous benefits and, at other times with respect to its health and welfare proposals, that it was simply better economics or that the Company thought it was a good number.

Accordingly, I conclude that Respondent did not claim any present or prospective inability to pay and therefore was justified in refusing the Union's request for corporate financial data. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *Georgia-Pacific Corp*., 305 NLRB 112 (1991).

The General Counsel also contends that Respondent bargained in bad faith by refusing to bargain over increase in sickness and accident benefits on December 15, 1992, during which Respondent made the first of its final proposals as noted above. The record discloses that the Union did propose an increase in S & A benefits. I am satisfied that Guise flatly refused to discuss that subject. This refusal to discuss a clearly mandatory bargaining subject constitutes a refusal to bargain and the fact that the matter was later brought into negotiations some months later and resolved does not absolve the Respondent.[8]

With respect to the matter of grievances, the record discloses that after the expiration of the contract Guise conceded that he expressed the position that grievances were not to be processed under the provisions of the expired contract. While some grievances, referred to by Guise as ''complaints,'' were resolved informally at discussions during negotiations, Guise never agreed to the processing of grievances filed after the expiration of the contract under the grievance provisions of the contract.

The U.S. Supreme Court has held that the grievance procedures of a collective-bargaining agreement, except for its arbitration provisions, survive its expiration. Thereafter, an employer may not unilaterally abandon the grievance procedure nor may an employer informally process grievances as it deems appropriate. *Litton Financial Printing Division*, 501 U.S. 109 (1991). This record discloses that by failing and refusing to process grievances under the grievance procedures of the expired contract, Respondent violated Section 8(a)(5) of the Act.

As noted above, at the January 15 negotiating session, Parrish, in addition to raising questions concerning Respondent's final offer of December 15, made a proposal, set out above, as a basis for possible settlement. Guise also expressed some optimism and agreed to take it back ''to management,'' presumably the management committee, for their consideration. At the next meeting however, on February 9, pessimism replaced optimism. Guise proposed to change the effective dates of any successor contract so that the contract would expire on December 31, 1995. The Union complained that the obvious ramification of this new expiration date would be to reduce the effect of any strike as a weapon since Respondent operations are seasonal and few employees are working at that time of the year in the dead of winter.

Respondent also proposed postponing of any wage increase 3 months, from September 26 to December 31, 1993, presumably to conform to the new contract dates and thus reducing, in essence, its wage proposal.

Respondent also announced that Travelers would replace Blue Cross/Blue Shield as the administrator of the health plan and announced it would be implemented April 1, 1993, apparently whether or not agreement was reached on a contract. In my opinion, Respondent offered no reasonable justification for the proposed change in contract dates except to say that they were not changes in the duration of the contract and that they would be into December once the contract was agreed on.

In my opinion, these proposals were made not with a view toward reaching agreement on mutually acceptable contract, but to unlawfully frustrate the bargaining process, in violation of Section 8(a)(5) of the Act.

After the March 9 and April 7 sessions in 1994, it appears that the Union returned to its membership on April 13 to consider the Respondent's final proposal. Parrish reviewed the course of negotiations with the membership, alluding to

[8] Consistent with the credibility resolution that Guise did not deny the existence of a 401(k) plan for other employees, I shall recommend the dismissal of the complaint as to that allegation.

those instances that he regarded as bad-faith bargaining on the part of the Respondent. The membership rejected the contract and authorized a strike to be called at a date selected by the negotiating committee. The strike lasted from April 26 to June 10, when the employees returned to work.

With respect to the question of whether the strike was an unfair labor practice strike or an economic strike, it is necessary to first review the unfair labor practices. I have concluded that during the course of the negotiations, Respondent unlawfully refused to provide the Union with information necessary and relevant to its status as collective-bargaining representative of unit employees, unlawfully refused to process grievances under the expired contract, made regressive proposals on February 9, designed to frustrate the bargaining process, and refused to discuss sickness and accident benefits, clearly a mandatory bargaining subject. Having reviewed the entire record, I am also satisfied that the Union took its strike action in response to those unfair labor practices and that there was a clear causal relationship between the Respondent's unfair labor practices and the membership's decision to strike. In these circumstances, I conclude that the strike was an unfair labor practice strike and that the striking unit employees were unfair labor practice strikers. *NLRB v. McKay Radio & Telephone Co*., 304 U.S. 333 (1938); *Domsey Trading Corp*., 310 NLRB 777, 791 (1993).

With respect to the matter of impasse, as noted above, Respondent, by letter dated May 5, 1994, implemented its final proposal effective May 10, 1994. Under existing precedent, an employer may, upon the arrival of a lawful impasse in negotiations, unilaterally implement its final offer without having committed an unfair labor practice. But impasse must have been lawfully arrived at. In the instant case, the Respondent, during the course of negotiations, committed several unfair labor practices set out above in some detail. It is my opinion that the unfair labor practices contributed to the impasse that was declared by Respondent and that those unfair labor practices tainted that impasse with the result that no legal impasse was ever reached. Accordingly, Respondent was not privileged to unilaterally implement its final offer and when it did so, any changes were made in violation of Section 8(a)(5) of the Act as unlawful unilateral changes in the terms and conditions of employment of unit employees. *Mohawk Liqueur Co*., 300 NLRB 1075, 1085 (1990).

2. The 8(a)(1) threat

As noted above, Respondent, by letter dated May 5, 1994, advised striking unit employees to return to work by May 9, 1994, or Respondent would hire replacements for them. If the strike had been an economic strike, this notification would simply have been an accurate statement of existing law to the effect that an employer may hire permanent replacements for economic strikers. However, it is also the law that an employer may not permanently replace striking employees when the strike has been caused by the Respondent's unfair labor practices. In the instant case, I have concluded that the strikers were unfair labor practice strikers whom Respondent could not legally permanently replace. Respondent's notice to unit employees that it would do so constitutes unlawful interference with employee rights under Section 8(a)(1) of the Act.

3. Vacation pay

It is undisputed that accrued vacation pay was deliberately not paid to some 20 striking employees during the strike pursuant to a decision of the management committee. In circumstances where benefits are withheld during a strike, the General Counsel must show that the benefits had accrued and that the benefits were withheld on the apparent basis of the strike. *Texaco, Inc*., 285 NLRB 241 (1987). Clearly, the benefits had accrued and, just as clearly, the apparent basis for their being withheld was the strike, particularly where Respondent was seeking the advice of counsel on the issue. In these circumstances, it is the burden of the employer to provide proof of a ''legitimate and substantial justification for its cessation of benefits.'' *Texaco, Inc*., supra at 245. Waiting for advice from an attorney does not qualify. Accordingly, I conclude that withholding accrued vacation pay during the strike was discriminatory within the meaning of Section 8(a)(3) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III above, occurring in connection with Respondent's operations described in section I above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in, and is engaging in, unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Having concluded that Respondent wrongfully denied vacation pay to striking employees Robert Seymour, Patrick Waldron, Joseph Hewitt, Carmen Lincks, Charles Pennington, Phil Printz, Harry Walker, Paul Giesbert, Joseph Stang, Robert Appel, Luther Burrick, Chester Stockman, Dale Jones, Stanley Biggus, Clark Kline, Melvin Pirkle, Robert Jackson, Sirrell Weant, Richard Mann, and Clifton Payne, I shall order that Respondent, to the extent that this has not already been accomplished, pay the above-named employees for accrued vacation time scheduled during the strike. Such payments shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co*., 90 NLRB 289 (1950).

CONCLUSIONS OF LAW

1. Respondent Genstar Stone Products Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, the unit described in article I of the expired collective-bargaining agreement (September 25, 1989, through September 25, 1992) is a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material, the Union has been, and is now, the exclusive representative of the employees in the above-

described bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Respondent and the Union were parties to a collective-bargaining agreement effective September 25, 1989, through September 25, 1992.

6. By refusing to bargain with the Union concerning contractual sickness and accident benefits, a mandatory bargaining subject, Respondent violated Section 8(a)(5) of the Act.

7. By refusing to provide information concerning health care insurance coverage, Respondent violated Section 8(a)(5) of the Act.

8. By refusing to process grievances under the grievance procedures of the expired 1992 contract, Respondent violated Section 8(a)(5) of the Act.

9. By unilaterally implementing the terms and conditions of employment set out in its letter to employees dated May 5, 1994, without valid impasse having been reached, Respondent violated Section 8(a)(5) of the Act.

10. The strike of bargaining unit employees conducted from April 26 to June 10, 1994, was an unfair labor practice strike, and the striking unit employees were unfair labor practice strikers.

11. By letter dated May 5, 1994, to employees, Respondent unlawfully threatened to permanently replace striking unit employees in violation of Section 8(a)(1) of the Act.

12. By refusing, during the strike, to pay unit employees for accrued scheduled vacation time, Respondent violated Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Genstar Stone Products Company, Hunt Valley, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain, on request, with the Union concerning sickness and accident benefits.

(b) Refusing to provide information concerning health care insurance coverage.

(c) Refusing to process grievances under the grievance procedures of the expired 1992 contract.

(d) Unilaterally implementing the terms and conditions of employment set out in its letter to employees dated May 5, 1994, without valid impasse having been reached.

(e) Threatening to permanently replace unfair labor practice strikers.

(f) Refusing to grant accrued vacation pay to striking employees because of their union activities.

(g) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the collective-bargaining representatives of unit employees.

(b) On request, provide to the Union information concerning health care insurance costs.

(c) On request, process under the grievance procedure of the expired 1992 contract all grievances filed after the expiration of the contract.

(d) Restore and place in effect all terms and conditions of employment provided by the contract that expired on September 25, 1992, which were unilaterally changed, except in such cases which the Union may request that a particular change not be revoked.

(e) Make whole employees Robert Seymour, Patrick Waldron, Joseph Hewitt, Carmen Lincks, Charles Pennington, Phil Printz, Harry Walker, Paul Giesbert, Joseph Stang, Robert Appel, Luther Burrick, Chester Stockman, Dale Jones, Stanley Biggus, Clark Kline, Melvin Pirkle, Robert Jackson, Sirrell Weant, Richard Mann, and Clifton Payne, to the extent that this has not been accomplished, for any loss of vacation pay they may have suffered by reasons of the discrimination against them found herein, to be computed in conformity with the remedy section of this decision.

(f) Make whole the unit employees for any loss of wages or other benefits they may have suffered by reason of the unilateral implementation of their terms and conditions of employment set out in its letter to employees dated May 5, 1994.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security records and reports, and all other records necessary to analyze the amounts of backpay due herein.

(h) Post at its operations in Frederick, Boyds, and Rockville, Maryland, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''